

No. 83-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

ITT CONTINENTAL BAKING CO., INC.,
HOSTESS CAKE DIVISION,

Petitioner,

vs.

BAKERY SALESMEN, DRIVERS,
WAREHOUSEMEN and HELPERS,
LOCAL UNION NO. 51,
affiliated with the
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS
OF AMERICA,

Respondent.

APPENDIX

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Dated: April 11, 1983

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APPENDIX A

No. 81-1781

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BAKERY SALESMEN, DRIVERS,
WAREHOUSEMEN AND HELPERS
LOCAL UNION NO. 51, affiliated
with the INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA,

ON APPEAL from
the United
States District
Court for the
Eastern District
of Michigan.

Plaintiff-Appellant,

v.

ITT CONTINENTAL BAKING
COMPANY, INC., HOSTESS CAKE
DIVISION,

Defendant-Appellant,

Decided and Filed November 1, 1982.

Before: EDWARDS, Chief Judge; MERRITT, Circuit
Judge; JOHNSTONE, District Judge.*

MERRITT, Circuit Judge. The sole issue on appeal in this
labor case arising from a multi-employer collective bargaining
agreement requires us to interpret the meaning of a contract
provision on arbitration. The issue is whether a dispute
concerning a long-standing company collections policy comes

* The Honorable Edward H. Johnstone, United States District Judge for
the Western District of Kentucky, sitting by designation.

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within the scope of a contract clause providing for arbitration of "any charge of violation of this agreement, charge of discrimination, grievance or dispute." The company policy in question makes truck drivers who sell, deliver and collect for bakery products pay for accounting discrepancies in monies collected from customers. We hold that the dispute is arbitrable and reverse the judgment of the District Court setting aside the arbitrator's decision.

I.

Appellant, Bakery Salesmen, Drivers, Warehousemen and Helpers Local Union No. 51 (a Teamster affiliate) brought this action pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C. §185 (1976), to enforce an arbitration award under a collective bargaining agreement between Local 51 and appellee, ITT Continental Baking Co., Inc., Hostess Cake Division. The District Court held that the dispute was not within the scope of the arbitration clause.¹ The Court therefore denied the union's motion for summary judgment and dismissed the complaint, a judgment which has the effect of setting aside the arbitrator's decision.

Local 51 and the company have been parties to a collective bargaining agreement covering the approximately 100

¹The District Court held as follows:

Although the language in the arbitration clause may be ambiguous, we do not believe it can be reasonably interpreted to allow such "interest" arbitration. The arbitrator's interpretation is such an extraordinary encroachment on the powers of management that to imply such a meaning more specific language is necessary to support it. . . . The interpretation given by the arbitrator would result in the company being subject to binding arbitration on every management decision that was not expressly covered by the contract and which the union sought to modify. The only way that management could establish policy would be to specifically include it in the agreement, otherwise the policy would be subject to an arbitrable decision. . . .

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driver salesmen who distribute Hostess Cake products to retail customers in the Detroit metropolitan area. The drivers delivered baked goods to some customers with authorized charge accounts who are billed directly by Hostess Cake and to other customers who must pay the drivers in cash or by check upon delivery. These collections are turned in to the company on a daily basis at "check-in time."

The arbitration award in question concerned one aspect of the check-in procedure that the company has established for the drivers. Upon return to headquarters at the end of the day, the driver must account for and turn in his collections as well as return unsold merchandise on his truck. The driver prepares a daily settlement sheet, recording the amount of cash, checks and coins received. He deposits the money and checks into an envelope, seals it, puts his route number, the date and the amount of the deposit on the outside and signs his name to the envelope. The envelope is dropped into a chute and falls into a metal safe. The driver receives no receipt or other verification that he has in fact enclosed the money and the checks listed on the settlement sheet in the envelope.

Thereafter the driver has no further control over what happens to the envelope. The next morning, other company employees open the safe, count the envelopes and seal them in canvas bags without opening or disturbing the contents of the envelopes in any way. An armored car service delivers the canvas bags to a local bank which acts as the company's depository. Sometime later bank tellers open each envelope and for the first time since the driver closed the envelope, the contents are counted. The tellers record on a tally sheet information including the date, individual driver deposit totals by route number, and any discrepancy between the amount

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listed on the outside of the envelope and what is actually inside. Drivers are charged or credited with the shortages or overages discovered by the bank tellers, regardless of amount or fault. An employee who fails to pay a shortage is suspended.

Although the procedure has been in existence for several years, Local 51 has recently sought to change the procedure because of several incidents, including the case of Tom Bowker, a driver who was required to pay a shortage that turned out to be the bank's fault. Bowker filed a grievance protesting the company's decision to require him to make up a cash shortage of \$400.00 on one of his daily deposits. Bowker denied the shortage was his fault, but the company forced him to pay. Three months later a bank executive advised the company that the shortage was caused by a bank employee. Bowker was credited for the shortage and received an apology.

In another case, the company forced driver Tom Pakledinaz to pay a \$600.00 shortage. His entire envelope was reported missing when company employees opened the deposit safe the next morning. He investigated and discovered that two of the checks from his envelope had been cleared through a store owned by a company supervisor. Apparently the supervisor stole the envelope and converted the contents. The supervisor was fired. The driver's shortage was forgiven and he was repaid.

As a result of these and other incidents, one of which resulted in the filing of an unfair labor practice charge, the union's secretary-treasurer filed a class action grievance protesting the check-in procedure as a company work rule or condition. After an evidentiary hearing, arbitrator Harold J.

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Dworkin found that no express term of the contract dealt with the company policy in question and that the subject had never been discussed in the industry-wide negotiations leading to the collective bargaining agreement. He found the dispute arbitrable and ordered the following relief:

On the basis of the evidence it is the arbitrator's finding and conclusion that it would be fair, reasonable, and practical to provide that driver salesmen be accorded some form of verification so as to assure that the summary sheet, a copy of which is included in each daily envelope, accurately corresponds with the contents as recorded by the driver salesmen. . . . On balance it is the opinion of the arbitrator that providing a driver salesman on a daily basis with verification in the form of an entry on his 'pink slip' or a receipt would inure to the benefit of both driver salesmen and management. It would provide a preliminary audit for correction of errors as reflected by a second count and would provide security to driver salesmen that the amounts placed in the envelopes had been accurately recorded on the summary sheets and verified by a company representative.

The arbitrator retained limited jurisdiction for six months to provide a "reasonable trial period" for the changes he ordered so that the award would remain in effect or be modified "subject to review on the basis of experience." The company refused to comply with the award. Forty days later the union commenced this action in the District Court.

The collective bargaining agreement in question has historically been negotiated on a multi-employer basis covering various commercial bakeries in the Detroit area. Neither the union nor the company negotiators ever presented proposals

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dealing with check-in procedures or discussed the subject at the bargaining table. Although the matter has been the subject of complaints and an unfair labor practice charge at Hostess Cake, the union viewed the dispute "essentially as a Hostess - Local 51 problem."²

II.

In the instant case, we have a broad no-strike clause pending arbitration given in exchange for a broad arbitration clause. The general approach to the interpretation of such arbitration provisions in collective bargaining agreements is governed by the *Steelworker Trilogy*, *United States Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960), *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), in which the Court established rules of contract construction strongly favoring arbitration coverage. In *American Mfg. Co., supra*, 363 U.S. at 567, the Court said that if "there is no exception in the 'no-strike' clause" then none "should be read into the grievance clause, since one is the *quid pro quo* for the other." In *Warrior & Gulf, supra*, the Court pointed out that in such situations arbitration "rather than a strike, is the terminal point of a disagreement" and with the exception of "matters the parties specifically exclude, all the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions." 363 U.S. at 581. "Doubts should be resolved in favor of coverage," and arbitration "should not be denied unless it can be said with

² Union president Picchi testified: "We don't seem to have it [the check-in procedure problem] as prevalent in other companies as this. I don't know. Maybe they [the other companies] use different bankers and they're all honest."

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positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.* at 582-83. Arbitration coverage under broad provisions, the Court observed, should no longer be read as automatically excluding company policies that in the past have been considered "strictly a function of management." *Id.* at 584.

Obviously there are limitations on this broad language favoring arbitration coverage, but the District Court mischaracterized those limitations. The District Court observed that although the arbitration provision including "any disputes" is ambiguous, it would not resolve the ambiguity in favor of coverage because "the interpretation given by the arbitrator would result in the company being subject to binding arbitration on every management decision that was not expressly covered by the contract and which the union sought to modify." The District Court's view would turn the Supreme Court's rules of construction upside down because it would exclude from arbitration all disputes concerning company policies, procedures and working conditions not covered by some express term of the agreement. The *Steelworkers Trilogy* clearly contemplates arbitration of disputes not covered by the express terms of the agreement, including disputes concerning company policies, procedures and working conditions.

Instead of the approach followed by the District Court designed to protect "management functions" from encroachment, courts should follow a flexible, undogmatic approach in the interpretation of arbitration clauses, especially in the interpretation of collective bargaining agreements arising from multi-employer or industry-wide negotiations. Multi-employer negotiators tend to concentrate on basic matters of common concern to all parties in drafting the substantive

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provisions of contracts. They tend not to focus on local problems in the interest of securing an agreement on universal issues. As counsel for the union points out in his supplemental brief:

The exigencies of reaching a settlement will discourage either side from making proposals that are of particular interest to only one employer or to one group of employees. Because problems with this work rule have arisen only at Hostess Cake and employees at other companies might not want their check-in procedure changed, the 'milieu' [see *Morris v. Warner-Continental, Inc.*, 466 F.2d 1185, 1191 (6th Cir. 1972)] in which this contract was negotiated clearly supports the arbitrator's determination that the policy grievance was arbitrable.

In short, the policy favoring arbitration espoused in the *Steelworker Trilogy* applies with even greater force in situations involving local disputes governed by multi-employer agreements. Such local controversies need to be resolved by arbitration since the issues are unlikely to be addressed at the bargaining table.

It is unrealistic to say, as did the District Court, that management policy decisions are not subject to arbitration under a broad arbitration clause accompanied by a broad no-strike provision, just as it would be unrealistic to say that all such decisions are subject to arbitration. Management policies requiring salesmen to drive unsafe trucks or to sell adulterated food subjecting themselves to arrest would clearly constitute disputes subject to arbitration. Company policies regarding product pricing or the sugar content of cakes would appear just as clearly not to present arbitrable disputes. Whether an arbitration clause includes a dispute

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concerning company policy in the multi-employer context depends on a number of factors: (1) the language of the arbitration clause; (2) the language of the no-strike clause; (3) the language of any management rights clause; (4) how directly the company policy in question affects employee working conditions and morale; (5) how directly the policy affects the company's profit structure and stockholders; (6) whether the dispute in question is industry-wide or limited to one employer; (7) the course of any contract negotiations concerning the disputed policy; and (8) whether any substantive provisions of the contract tend to support or negate the policy in question.

Applying these factors to the disputed policy here, we find (1) the arbitration clause is broad, covering "any dispute" without express limitation; (2) the no-strike clause is broad and is given in exchange for the broad arbitration clause; (3) there is no management rights clause in the contract; (4) the policy in dispute subjects employees to false accusations of defalcation and occasionally causes unjustified employee loss and the filing of unfair labor practice charges; (5) a change of policy would affect company profits only minimally; (6) the dispute is limited to one employer in the multi-employer group; (7) there were no contract negotiations on the disputed policy; and (8) no substantive contract provisions touch on the question. Thus, the first six factors mentioned favor arbitration, and the last two factors are neutral on the question.

Taking into account these factors and the preference for arbitration coverage found in the rules of contract construction set out in the *Steelworkers Trilogy*, we conclude that the District Judge erred in dismissing the union's complaint seeking confirmation of the arbitrator's decision.

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Accordingly, the judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BAKERY SALESMEN, DRIVERS,
WAREHOUSEMEN AND HELPERS
LOCAL UNION NO. 51 A/W THE
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN & HELPERS OF
AMERICA,

Civil No. 81 71232
Plaintiff.

v.

ITT CONTINENTAL BAKING
COMPANY, INC., HOSTESS CAKE
DIVISION,

Defendant.

MEMORANDUM OPINION

The plaintiff union filed this motion for summary judgment to enforce the provisions of an arbitration award, which declared defendant's daily money check-in procedure "unfair" to its driver salesmen. This procedure required each driver to record on a deposit slip at the end of each day all the cash and checks received from sales made on an assigned route. This deposit slip was then placed in a sealed envelope and deposited in the company safe. The next morning, the company employees counted the sealed envelopes and recorded the information. Thereafter, the envelopes were delivered by armor car to the company's bank where the envelopes were unsealed by bank employees and the money

and checks counted and credited to the company account. The driver was required to reimburse the company for any shortages reported between the contents in the envelope and the deposit slip.

The union filed a grievance which stated in part:

... I protest the check-in procedure at both branches of Hostess Cake Company. The present system does not provide any guarantee that the man has deposited the money or checks that he indicates on the deposit ticket. We would like the Company to check our envelopes to be sure that the amount of money and/or checks is the same as we indicate on the deposit ticket.

The arbitrator found this grievance arbitrable under Article XXIII, section 1(a) of the collective bargaining agreement which provides:

It is agreed that, should any charge of violation of this agreement, charge of discrimination, grievance or dispute arise between the parties hereto, such matters shall be taken up within ten days of the alleged occurrence or it shall be deemed waived. The parties shall make an earnest effort to settle such controversy amicably, but if they fail to do so, it shall be submitted to arbitration as provided below.

In an award dated March 13, 1981, the arbitrator found that the grievance did not "arise under any *express* terms and conditions of employment as set forth in the agreement" and did not "charge the company with a violation of any provision of the agreement," but nevertheless was arbitrable because of the "comprehensive language defining a grievance which extends to any 'violation of this agreement' as well as a 'grievance or dispute' which may arise between the parties." Award

at 14. The arbitrator then considered the merits of the grievance and concluded that "it would be fair, reasonable, and practical to provide that driver salesmen be accorded some form of verification" that the contents of their envelopes correspond with their deposit slips. *Id.* at 14. The arbitrator then indicated that he would retain jurisdiction for six months to reconsider upon the written request of either party the new check-in procedure which he suggested. On April 24, 1981, the company did submit a request for reconsideration which was denied in a letter dated May 29, 1981. The union filed this action on April 21, 1981. On May 14, 1981, the company filed its answer with an affirmative defense which we treat as a counterclaim for vacation of the arbitration award.

The plaintiff contends that the company waived whatever defenses it may have had regarding enforcement of the award by failing to file a timely petition to vacate. Plaintiff argues that jurisdiction of the court is invoked pursuant to § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, and, therefore, timeliness is determined as a matter of federal law by reference to the appropriate state statute of limitations. The plaintiff argues that the appropriate state limitation period is the 20-day period provided in Michigan General Court Rule 769.9(2). Even if we were to apply Michigan's 20-day limitation period, defendant's challenge to the validity of the award is timely. The award itself provides a six-month trial period for a new check-in procedure suggested by the arbitrator. The arbitrator then retained jurisdiction so that he might review written requests by either party for reconsideration of the award. Presumably, if the suggested procedure took "an inordinate amount of time," the arbitrator would have set the award aside. The defendant sought such reconsideration and the award did not become final until the arbitrator decided the rehearing issue. The time period

could not begin to run until May 29, 1981, the date the arbitrator denied defendant's request to reconsider the award or re-open the record.

In any event, we believe the appropriate limitation period is the three-month period set forth in the United States Arbitration Act (USAA), 9 U.S.C. § 12, and conclude, therefore, that defendant's challenge to the validity of the award is timely. *Gas Workers Local No. 80 v. Michigan Consolidated Gas Co.*, 503 F. Supp. 155 (E.D. Mich. 1980); *Lumber Production & Industrial Workers, Local 3038 v. Champion International Corp.*, 486 F. Supp. 813 (D. Montana, 1980); *Communication Workers of America v. Pacific Telephone & Telegraph Co.*, 462 F. Supp. 736 (C.D. Calif. 1978). The plaintiff here has invoked the court's jurisdiction under both § 301 and the USAA. This lends support to the reasonableness of applying the limitation period set forth in the USAA.

The plaintiff's reliance upon *International Union v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), and *United Parcel Service v. Mitchell*, U.S. , 41 U.S.L.W. 4378 (April 30, 1981) to support his contention that Michigan's 20-day rule is the appropriate limitations periods is misplaced. Neither *Hoosier Cardinal Corp.* nor *United Parcel Service* were direct actions to enforce or vacate an arbitration award as is involved here. Rather, they involved claims of the breach of the duty of fair representation tainting an otherwise binding arbitration process. Although recognizing that uniformity is necessary under the LMRA in order to mold a national labor policy, *Hoosier Cardinal* created an exception for statutes of limitation under § 301 because "there is no justification for the drastic sort of judicial legislation" that a federal common law limitation would represent. 383 U.S. at 703. The Court reasoned that no need for uniformity existed because the goal of such uniformity was to facilitate the "smooth functioning

of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective bargaining agreement and the private settlement of disputes under it. For the most part, statutes of limitation come into play only when these processes have already broken down." Where the validity of the arbitration award itself is being considered, rather than a collateral attack upon the process surrounding the issuance of the award, the process for private settlement has not broken down. Enforcement of the award is the culminating step in the process. The inquiry of the court when presented with such a case is limited to issues of whether the arbitrator acted within his authority under the bargained contract. Substantive or factual issues on the merits of the award are not addressed. *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960); *Timken Company v. United Steelworkers of America*, 492 F.2d 1178 (6th Cir. 1974). The decision whether to enforce an award is merely a safeguard to the private settlement mechanism which by avoiding arbitrary and capricious results facilitates its functioning.

Here, the arbitrator rejected the company's objection to the arbitrability of the union's grievance. The arbitrator believed that "interest" arbitration was permissible under the collective bargaining agreement and he proceeded to render an award on that basis. Plaintiff's attempt to characterize this action as a "rights" action appears to be unsupported by the facts, the collective bargaining agreement, or the language of the award. In his preliminary statement, the arbitrator indicates "the parties have acknowledged that the subject matter relating to the daily check-in procedure had not been the subject of prior negotiations, nor was it discussed at the bargaining table. The check-in procedure was unilaterally established by management several years ago. According to the testimony of witnesses, the procedure has

been in effect for some eighteen—twenty-one years.” Award at 2. In his findings, the arbitrator stated that: “It is the conclusion of the arbitrator that the instant dispute, which involves the union’s challenge of a certain aspect of the check-in procedure reasonably constitutes a dispute between the parties relating to terms and conditions of employment, *not* covered by the agreement and, therefore, constitutes an arbitrable issue. The grievance is in the nature of an “*interest*” dispute and is properly before the arbitrator for determination.” Award at 8. (Emphasis added.) Although the union argues that “[the arbitrator’s] . . . findings . . . indicate that in recent years the procedures have lost whatever acceptability or mutuality it may once have had,” there appears to be no such finding. Union brief at 13-14. The union appears to regard such a finding implicit in the arbitrator’s observation that “there had been a grievance filed in 1978 and numerous complaints on the matter in the past year and half.” Certainly, the mere fact that the union has complained about a procedure and that several grievances had been filed does not make a 20-year policy suddenly devoid of acceptability or mutuality. Indeed, the company stated that there were only approximately 6 incidents regarding driver shortages in the last several years out of a complement of 82 drivers.

We believe that the interpretation given to the arbitration clause is simply not reasonable. Although the language in the arbitration clause may be ambiguous, we do not believe it can be reasonably interpreted to allow such “*interest*” arbitration. The arbitrator’s interpretation is such an extraordinary encroachment on the powers of management that to imply such a meaning more specific language is necessary to support it. The arbitrator recognized this when he stated “the agreement contains no management right’s clause. It must, therefore, be concluded that the company has retained the customary, and traditional rights of management except as

expressly restricted, or bargained away through the collective bargaining process, and as may appear in the agreement." Award at 8. The arbitrator does not, however, address this concern further. The interpretation given by the arbitrator would result in the company being subject to binding arbitration on every management decision that was not expressly covered by the contract and which the union sought to modify. The only way that management could establish policy would be to specifically include it in the agreement, otherwise the policy would be subject to an arbitrable decision on whether it was "fair, reasonable and practical" to modify it if so requested by the union. To receive this benefit all the union would need do is refrain from bargaining or negotiating regarding the policy. It seems to us that this is contrary to the collective bargaining process.

Accordingly, plaintiff's motion for summary judgment enforcing the arbitration award should be denied and the complaint dismissed without cost or attorney fees.

IT IS SO ORDERED.

/s/ ROBERT E. DeMASCIO

Robert E. DeMascio
United States District Judge

Dated: November 18, 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BAKERY SALESMEN, DRIVERS,
WAREHOUSEMEN AND HELPERS
LOCAL UNION NO. 51 A/W THE
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN & HELPERS OF
AMERICA,

Plaintiff, Civil No. 81 71232

v.

ITT CONTINENTAL BAKING
COMPANY, INC., HOSTESS CAKE
DIVISION,

Defendant.

JUDGMENT

This matter having come before the court on plaintiff's motion for summary judgment enforcing the arbitration award, and the court having entered its Memorandum Opinion,

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED

that plaintiff's motion for summary judgment be and the same hereby is DENIED and the complaint is hereby DISMISSED without cost or attorney fees.

Dated at Detroit, Michigan, this 18th day of November 1981.

/s/ ROBERT E. DeMASCIO

Robert E. DeMascio
United States District Judge

APPENDIX C

No. 81-1781
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

<p>BAKERY SALESMEN, DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 51, affiliated with the INTERNATIONAL BROTH- ERHOOD OF TEAMSTERS, CHAUF- FEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,</p>	<p>FILED JAN. 11, 1983 JOHN P. HEHMAN, CLERK</p>
<p><i>Plaintiff-Appellant</i></p>	<p>ORDER DENYING PETITION FOR REHEARING EN BANC</p>
<p>v.</p>	

ITT CONTINENTAL BAKING COM-
PANY, INC., HOSTESS CAKE DIVI-
SION,

Defendant-Appellee

Before: EDWARDS, Chief Judge; MERRITT, Circuit Judge;
JOHNSTONE, District Judge*

A majority of the court having not voted in favor of an en banc rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN

Clerk

* The Honorable Edward H. Johnstone, United States District Judge for the Western District of Kentucky, sitting by designation.

APPENDIX D

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 81-1781

**BAKERY SALESMEN, DRIVERS,
WAREHOUSEMEN AND HELPERS
LOCAL UNION NO. 51 A/W THE
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN & HELPERS OF
AMERICA,**

Plaintiff-Appellant,

v.

**ITT CONTINENTAL BAKING
COMPANY, INC., HOSTESS CAKE
DIVISION,**

Defendant-Appellee.

**Before: EDWARDS, Chief Judge; MERRITT, Circuit Judge;
JOHNSTONE, District Judge.**

JUDGMENT

**APPEAL from the United States District Court for the
Eastern District of Michigan.**

**THIS CAUSE came on to be heard on the record from the
United States District Court for the Eastern District of Mich-
igan and was argued by counsel.**

**ON CONSIDERATION WHEREOF, It is now here ordered and
adjudged by this Court that the judgment of the said District**

Court in this cause be and the same is hereby reversed and the case is remanded for further proceedings consistent with the opinion of this Court.

It is further ordered that Plaintiff-Appellant recover from Defendant-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE
COURT

JOHN P. HEHMAN, CLERK

/S/ JOHN P. HEHMAN

CLERK

Issued as Mandate:

January 19, 1983

A True Copy.

COSTS: None

Attest:

Filing fee \$

Printing \$

/s/ Linda L. Brinson

Total \$

Deputy Clerk

APPENDIX E

AWARD OF ARBITRATOR
FEDERAL MEDIATION AND CONCILIATION SERVICE
VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the

Arbitration Between:

ITT CONTINENTAL BAKING COMPANY

HOSTESS CAKE DIVISION

Detroit, Michigan

HARRY J. DWORKIN,
ARBITRATOR

-and-

BAKERY, SALESMEN, DRIVERS,
WAREHOUSEMEN AND HELPERS,
LOCAL UNION NO. 51

GRIEVANCE: RE CHECK OUT MONEY PROCEDURE

APPEARANCES

On Behalf of Company

GREGORY J. SCHROEDTER
(William B. Hanley &
Associates, Ltd.)

Counsel for Company

On Behalf of Union

GERRY M. MILLER
(Goldberg, Previant, Uelman,
Gratz, Miller, Levy &
Brueggeman, S.C.)

Counsel for Union

THE ISSUE

SHOULD CHECK-OUT PROCEDURE BE MODIFIED SO AS TO PROVIDE EACH DRIVER SALESMAN SIGNED VERIFICATION OF CONTENTS OF ENVELOPE DEPOSITED ON A DAILY BASIS?

PRELIMINARY STATEMENT AND BACKGROUND:

The issue embodied in the grievance processed to arbitration does not appear on its face as involving any of the negotiated terms and conditions of employment. The current

collective bargaining agreement, effective for the period October 6, 1979 through October 3, 1982, contains no express language governing the check-in procedure. The parties have acknowledged that the subject matter relating to the daily check-in procedure had not been the subject of prior negotiations, nor was it discussed at the bargaining table.

The check-in procedure was unilaterally established by management several years ago. According to the testimony of witnesses, the procedure has been in effect for some eighteen—twenty-one years.

The union is here challenging one aspect of the check-in procedure. The union is protesting the company's refusal to provide each salesman driver with a signed, or initialed receipt verifying that the contents of the envelope deposited in a safe by each salesman driver on a daily basis correspond with the contents as appear on the driver's "daily cash and check record". The form that accompanies the envelope indicates the checks issued by customers, the amount of currency, coins listed by denomination, together with a summary of checks, currency, coins, and food stamps received by the driver in payment of merchandise.

The company considers the union's request unwarranted, and serving no meaningful purpose. The company asserts that, were the union's request to be granted it would entail a substantial amount of time on the part of company employees, together with additional costs. The union's request would impose an unwarranted burden without factual basis or benefit either to the company or driver salesman.

The company is engaged in the general baking business and distribution of its products to retail outlets. Its principal

product is sold under the trade name "Hostess Cakes". Distribution is made through two main distribution centers in the Detroit area, one being at Troy, and the other at Lavonia, Michigan.

Driver salesmen are represented by Local Union No. 51. There are approximately 100 driver salesmen within the bargaining unit divided between the Troy, and Lavonia distribution centers. Salesmen drivers operate company vehicles on prescribed routes. The trucks are loaded with merchandise on each morning of a weekday. Driver salesmen deliver, and sell the products to various customers along routes to which each driver is assigned. Customers are divided into two categories as regards the method of payment for merchandise. One category consists of customers who have charge accounts, and are billed by the company on a monthly basis. All others pay for merchandise when delivered. Payment is made through cash, checks, or food stamps. Each driver salesman tenders a receipt for the amount paid by a customer whether in cash, or by check.

Upon returning to the distribution center at the end of a day the truck customarily contains unsold merchandise, or return of merchandise from customers. The truck contents are inventoried, and set aside for delivery to the company's thrift stores where it is sold at a reduced price. The driver's inventory is compared with the recorded dollar value of the merchandise issued to the driver salesman at the start of his work day. The driver salesman is then required to count the proceeds of his sales, noting the amount of cash, checks, coin, and food stamps, which information is recorded on a prescribed form. The proceeds are then deposited in an envelope, sealed by the driver, identified on the outside with the route

number, date, total deposit, and salesman's signature. The envelope is then placed in a shute, which in turn lodges the envelope in a metal safe.

The specific problem, and issue appealed to the Arbitrator for resolution in the form of an award stems from the fact that the driver salesman is not provided with a receipt at the time he deposits the envelope in the safe. The union is here seeking an award that would require a designated representative of the company to be present during the check-in procedure and count the funds, checks, and food stamps contained in each driver salesman's envelope, and verify same either by issuing him a receipt, or initialing the outside of the driver's "daily cash and check record".

In order to more fully understand the problem here presented, it is deemed appropriate to set forth with specificity the steps of the daily check-in-procedure observed by each driver salesman, which is as follows:

1. Checks out return of goods;
2. Unloads empty cake trays and puts them aside;
3. Proceeds to office to check-in receipts;
4. Completes daily cash and check record ("Settlement Sheet");
5. Each salesman driver stamps company's endorsement on back of each check (so as to guard against diversion, or misapplication of check);
6. Driver salesman then seals the flap of the envelope, and places it in shute for deposit in safe;
7. Yellow copy of settlement sheet delivered to supervisor; driver retains pink copy;

8. The safe is opened by two company employees on the following morning who count the envelopes (without disturbing the contents) and record the number of sealed envelopes.

The envelopes are then placed in canvas money bags and returned to the safe in a sealed condition. None of the company's employees thereafter count the envelopes, or disturb their contents. The canvas money bags containing the sealed envelopes are collected by Brinks Express, and delivered to the company's depository, National Bank of Detroit. Upon receiving the canvas bags bank tellers open each envelope and count the contents. A form is then filled out by the bank and delivered to the ITT Continental Baking Company. The form has columns indicating the following:

<u>Deposit Date</u>	<u>Amount of Deposit</u>	<u>Route No.</u>	<u>Over*</u>	<u>Short**</u>	<u>Explanation</u>	<u>Driver Total</u>
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*The column "over" records the amount found in the driver salesman's envelope *in excess* of that which is recorded;

**The "short" column indicates any deficiency between the amount included in the envelope and that reported by the driver salesman on his settlement sheet.

Under the column "explanation" the bank teller notes explanatory information. The following notations are illustrative: "check \$4.00 listed 7.74, error in addition"; or, "checks \$23.92 — \$22.99 & \$20.00 listed, not enclosed." One such "explanation" appearing on a driver-salesman's summary sheet dated August 24, 1980, identified three checks that were listed on the driver's settlement sheet but were not found in the envelope when opened by a bank teller on the morning of delivery. It was later determined that the three

checks reported as missing were inadvertently left on the driver salesman's dresser, and when found were returned for deposit.

Of particular relevance to the instant dispute is the practice of charging each driver salesman with any shortages or discrepancies appearing in his envelope as noted by the bank. Similarly, each driver salesman is credited with excess funds in his envelope over and above that which he reported.

The union has urged that after the envelopes are deposited in the safe errors may occur on the part of others, including possible misapplication of funds. Envelopes may be misplaced after their removal from the safe. The contents may not be counted correctly by the bank tellers. Should any of the foregoing appear, the driver salesman may be subject to personal liability in event shortages may be reported by the bank due to errors, or wrongful acts on the part of others over which the salesman has no control.

The union urges that, were the company to provide each driver with a receipt, or verification of the accuracy of the contents of each envelope, it would substantially allay the driver salesman's concern, and protect him against discrepancies attributable to others, and occurring after the envelope is deposited in the company's safe.

GRIEVANCE AND CONTRACT PROVISIONS:

A grievance was filed under date of February 6, 1980, which is in the form of a policy grievance, on behalf of all sales employees within the bargaining unit represented by Local No. 51, and assigned to the two distribution centers. The text of the grievance is as follows:

On behalf of all sales employees at Hostess Cake covered under the existing Agreement with Local No. 51, I protest the check-in procedure at both branches of Hostess Cake Co. The

present system does not provide any guarantee that the man has deposited the money or checks that he indicates on the deposit ticket. We would like the Company to check our envelopes to be sure that the amount of money and/or checks is the same as we indicate on the deposit ticket.

A prior grievance dated August 19, 1978, was introduced into evidence in which Tom Bowker, a driver salesman was charged with a deficiency in his envelope of \$404.00. However, it was later determined that the discrepancy resulted from an error of the bank. The driver was reimbursed by the bank for the amount with which he was charged, together with interest. The prior grievance related principally to a complaint on the part of the driver that he had been improperly charged with \$404.00; the grievance did not expressly request that the check-in procedure be revised. However, the text of the prior grievance is relevant in that it serves to provide relevant background with reference to the policy grievance presently before the Arbitrator:

On July 8, 1978 I made a deposit into company safe, \$86.00 in checks, \$404.00 cash. I forgot to list money on deposit slip while checking out. Money was stolen after being deposited into safe. Bank shows record of receiving checks only. Company made me pay \$404.00 on August 18 or I could not work Aug. 19. Stewart talked to supervision on Aug. 15, and said I had to pay.

My grievance is having to pay money that was stolen after being put in safe. There are no steps taken to assure money is deposited and no protection for the route person. We are responsible for the money after it is dropped into safe, which we have no control of. We can't even use a check for the cash deposited. This is

a terrible way of handling money and the company does not really care much since route man is responsible.

From what I understand there are few people that handle money from the route man to the bank. Why can't they find out who stole the money, instead of taking the path of least resistance and making the route man pay.

Since the company seems satisfied with this poor security system and do not allow the route man any protection, they should be held responsible for stolen money, and then they would find a better way of handling money.

/s/ Tom Bowker

As heretofore indicated, the collective bargaining agreement contains no express language, or reference to the check-in procedure. The following provisions define the scope of grievances or complaints that may be referred for final and binding decision by a Board of Arbitration, a Board having been waived in the instant case:

ARTICLE XXIII — ARBITRATION

Section 1. Grievance Procedure

(a) It is agreed that, should any charge of violation of this Agreement, charge of discrimination, grievance or dispute arise between the parties hereto, such matter must be taken up within ten (10) days of the alleged occurrence or it shall be deemed waived. The parties shall make an earnest effort to settle such controversy amicably, but if they fail to do so it shall be submitted to arbitration as provided below.

As appears in the language of Section 1(a), grievances that may be appealed to arbitration include charges of violation of

express provisions of the Agreement, charges of discrimination including any "grievance or dispute" that may "arise between the parties". It is the conclusion of the Arbitrator that the instant dispute, which involves the union's challenge of a certain aspect of the check-in procedure reasonably constitutes a dispute between the parties relating to terms and conditions of employment not covered by the Agreement, and therefore, constitutes an arbitrable issue. The grievance is in the nature of an "interest dispute and is properly before the arbitrator for determination on the merits.

The Agreement contains no "management rights clause". It must therefore be concluded that the company has retained the customary, and traditional rights of management except as expressly restricted, or bargained away through the collective bargaining process, and as may appear in the Agreement.

POSITION OF UNION:

The union acknowledges that the problem, and request for relief are not expressly covered by any language appearing in the Agreement. However, the issue is one of major concern to driver salesmen, and, unless resolved will continue to plague the parties generating concern, and insecurity on a continuous and daily basis. The union points out that after a driver has completed his settlement sheet, and deposits the fund in a sealed envelope he is haunted by fear that discrepancies will thereafter be reported and that he will be unjustly charged with shortages due to error, or misapplication of funds by others who handle the envelope and contents after they are deposited in the company's safe.

The heart of the union's complaint is that no company official checks, or counts the contents of the driver salesman's envelope prior to sealing, and placing it in the safe. The

functions of the two company employees are limited to counting the number of sealed envelopes, and then placing them in canvas bags for Brinks Express to deliver to the company's depository.

The union reasons that there is an omnipresent concern on the part of the driver salesmen that an unexplained loss, or theft may occur *after* the envelope is sealed, and deposited. Such discrepancy may be due to error, or even criminal activity on the part of third parties over whom the driver salesman has no control. The driver salesman is informed by an official of the company in event the bank deposits reflect shortages, or overages which are attributed to each individual driver. Even though reports of a shortage may not be due to any error on the part of the employee, nevertheless,

...he is instructed to make good the shortage within a designated number of days, or be subject to being debited or being subject to disciplinary action.

The gravamen of the union's complaint is, that, driver salesmen are accorded no opportunity to make an explanation, nor are they permitted to check the bank tellers' accuracy who count the contents of the envelopes, and record the results. The union reasons that a bank teller may report deficiencies, or overages in a driver salesman's daily envelope which may be due entirely to error on the part of the bank employee, or even criminal activity. As a result of errors on the part of others,

...the driver salesman may in effect be accused of being a thief, without any proof to substantiate the charges.

The union emphasizes that the driver salesman has no control over the envelope, or its contents after it is sealed, and placed in the safe.

The union is here seeking an award which would effect a change in the check-in procedure at both distribution centers, and accord reasonable protection to driver salesmen as regard unwarranted claims of shortages, or overages. The union requests that the check-in procedure be revised so as to insure that the amount of money, and checks which the driver has counted, and deposited in the envelope are certified by a company employee who would conduct a separate count, or audit. The union requests that a receipt be given to each driver salesman so as to eliminate the "continuous cloud", concern, and insecurity to which driver salesmen are subject under the existing procedure.

POSITION OF COMPANY:

The company contends that its present check-in procedure is reasonable, and provides adequate means for employees to expeditiously check-in, and report their daily receipts without subjecting either the salesman driver, or company to any unreasonable burden, or expense. The company points out that the existing check-in procedure has been in effect for at least as long as eighteen years, and that it has functioned satisfactorily. Such conclusion is demonstrated by the fact that there have been but a few instances of any substantial errors, or discrepancies as regard the amounts recorded on the driver salesman's settlement sheet, and report of the company's bank after the contents were counted, and tallied.

The check-in procedure requires each driver salesman to make a daily accounting of the products for which he has been charged, as well as the left-over items that are returned at the end of the day. The driver salesman is required to make an accurate report of the day's receipts in the form of checks, cash or food stamps, all of which must be in balance.

It is considered reasonable to require that each individual driver be responsible for counting and recording his daily

receipts, and accurately completing the settlement sheet. The funds are placed by each driver in a manila envelope, sealed, signed, and deposited in a safe. The driver is adequately protected inasmuch as he retains a pink copy showing the contents of the envelope recorded in his own handwriting. All envelopes placed in the safe by driver salesmen are counted the following morning by two company employees. They are required to open the safe, remove the sealed envelopes, conduct a count of the envelopes (not their contents) and then place the envelopes in canvas bags.

The company emphasizes that its employees do not break the seal, or open the envelopes, nor do they concern themselves with the contents. Their sole tasks are to count, and record the number of envelopes, place the envelopes in a canvas bag, and make them ready for collection by Brinks. The sealed canvas bags are collected by Brinks, who in turn delivers them to the company's bank.

After the canvas bags are delivered to the bank, tellers count the contents of the envelopes, conduct a final audit, and the results are posted indicating any discrepancies attributable to individual drivers in the form of shortages, or overages. The number of discrepancies have been limited, as indicated by some 6-8 incidents either short, or over encompassing several years, out of a total complement of some 82 drivers.

Although the check-in procedure has been in effect for some twenty-one years, the subject matter had never been raised during negotiations by either side, and only a very few grievances have been filed. One such dispute which arose in 1976 in the form of an unfair labor practice charge related to Driver Salesman T. Pakledinaz. The problem resulting from a complete disappearance of the employee's envelope referred to as "Cash Turn-in of March 5, 1976". The company had taken the position that the salesman was responsible for

the loss, or disappearance of his envelope; and, that a driver salesman cannot "waive his responsibility to properly turn in his/her daily cash receipts (properly recorded *and* deposited into a safe) * * *". In the case referred to, after careful consideration the company concluded that "the facts in this case appear not to warrant restitution by Mr. Pakledinaz."

It is acknowledged that the envelope was missing. The company believed that Pakledinaz had never dropped the envelope in the chute. A security investigation disclosed that a management employee found the envelope outside of the safe, thereby indicating neglect in failing to assure that the envelope was deposited in the safe. In light of these "unique circumstances" the unfair labor charge was settled on a "non-precedent basis."

In the letter to the union the company advised that restitution would not be required; however, the company reiterated the responsibility of driver salesmen:

* * *

It must remain understood, however, that all sales representatives MUST properly turn in daily receipts and the variance granted in this particular case shall, in no way, alter the established past practice of employees' making full restitution upon failure to properly account for their funds. The facts in this particular case are unique and it shall not be considered a precedent in any way, shape or form.

Any future instances of failure to properly account for such funds will result in the sales representative's making full restitution.

On the basis of the company's proposal not to require restitution, the union, and driver salesman withdrew their unfair labor practice charge, and stated as follows:

* * *

I also agree that the circumstances surrounding the loss of the envelope on or about March 5, 1976, were very unique, and that this instance does not alter or modify my responsibility of making sure that all my envelopes are properly placed in the company safe nightly.

The settlement of this one situation is not to be considered as setting a precedent of relieving me, or any other Route Sales Representative, of our responsibility in properly securing our settlement envelopes.

It is the company's position that no change, or modification in the existing procedure is warranted, or required. The company maintains that its daily and weekly settlement sheets constitute documents,

...whereby each salesperson properly accounts for merchandise delivered to him (her) by the Company. It is the absolute responsibility of such salesperson to *accurately and honestly* complete the forms and properly report on all of his (her) sales transactions. When signed by the salesperson, they become representations of the truthfulness of all statements and numbers therein. Any falsification of matters appearing on the Settlement Sheets constitutes a criminal act and could subject the salesperson to legal sanctions.

* * *

ARBITRATOR'S FINDINGS AND OPINION:

The subject matter before the Arbitrator does not constitute a grievance arising under any *express* terms and conditions of employment as set forth in the Agreement; nor does the grievance charge the company with a violation of any

provision of the Agreement. The dispute is in the nature of a policy grievance in which the union seeks relief in the form of an award that would modify the existing check-in procedure so as to provide each driver salesman with a receipt, or other form of verification of the funds turned over to the company, or dropped in the safe at the end of each day's activities.

The evidence establishes that the union has never attempted to negotiate, or effect a change in the existing procedure at the bargaining table. The existing check-in procedure has been in effect, and has remained unchallenged for at least as long as twenty-one years. The evidence indicates further that Local 51 has over a period of some 1½ years importuned management on several occasions to provide verified receipts to drivers of the contents of their envelopes on a daily basis.

The contract contains no specific or express management rights clause. It must therefore be considered that the company has retained all of its managerial rights, and residual prerogatives not expressly, or by clear implication restricted, or modified by language appearing in the Agreement.

In light of the broad, and comprehensive language defining a grievance which extends to any "violation of this Agreement" as well as a "grievance or dispute" which may arise between the parties, it is the judgment of the Arbitrator that the question posed is arbitrable on its merits. Resolution of the issue requires an assessment of the evidence so as to determine whether the union's request is fair, reasonable, and warranted, and requires that appropriate relief be fashioned in the form of an Award.

The Arbitrator has thoroughly studied, considered, and evaluated the positions of the parties as reflected by the evidence adduced at the arbitration hearing, including well-

reasoned post hearing briefs. On the basis of the evidence it is the Arbitrator's finding and conclusion that it would be fair, reasonable, and practical to provide that driver salesmen be accorded some form of verification so as to assure that the summary sheet, a copy of which is included in each daily envelope, accurately corresponds with the contents as recorded by the driver-salesman. Such verification need not be in any precise form. It would suffice if a representative of the company, whether he be a bargaining employee or outside the bargaining unit make his own count, and either initial the pink slip retained by the driver salesman, or provide a separate receipt.

The Arbitrator is fully aware that additional time may be involved in recounting the contents of the envelopes, estimated at some six minutes for each driver salesman, for approximately forty employees at each of the two distribution centers. It would also appear that in most instances the totals recorded by the driver on his summary sheet would be correct, and require merely a simple verification on an adding machine. In still other instances, the time required may be somewhat longer. The time involved would also constitute an additional burden in the form of "waiting time" assumed by driver salesmen, inasmuch as they are paid strictly on a commission basis. The time involved while waiting for verification and recount might in some instances be extensive for which compensation would not be required. Since driver salesmen are paid on a commission basis only, the company would not be saddled with any additional costs resulting from drivers being required to wait at the distribution center in order to complete the procedure as directed by the Arbitrator. The company's additional cost would be limited to the services of one, or more company representatives during the period required to verify the contents of the envelopes.

In event it should be determined on the basis of a reasonable trial period that an inordinate amount of time is required in counting and verifying the contents, and correcting discrepancies, any such problem should be subject to review on the basis of experience. The Arbitrator will therefor retain jurisdiction for a period of six months, at the end of which time written request made by either party may be reviewed, and the Award reconsidered.

The Arbitrator notes the concern of the company that were it to assign bargaining unit employees to count, and verify the returns of the driver salesmen it may present problems involving dual loyalty, and the possibility of collusion (which the company acknowledges would be unlikely). Should such problems arise, the company would have the inherent right to adequately protect itself against any such adverse consequences. Should instances arise of disloyalty, or collusion in implementing the verification procedure such would be subject to application of appropriate discipline, including discharge where the circumstances warrant.

On balance it is the opinion of the Arbitrator that providing a driver salesman on a daily basis with verification in the form of an entry on his "pink slip", or a receipt would inure to the benefit of both driver salesmen, and management. It would provide a preliminary audit for correction of errors as reflected by a second count, and would provide security to driver salesmen that the amounts placed in the envelopes had been accurately recorded on the summary sheets, and verified by a company representative. Such procedure would serve to eliminate the,

...constant worry and concern, as to whether the contents of the envelope will be

E-18

fully accounted for after it is placed in the company's possession, and the driver no longer has no control.

Respectfully submitted,

/s/ HARRY J. DWORKIN

HARRY J. DWORKIN,
ARBITRATOR

AWARD

In the Matter of the Arbitration Between:

ITT CONTINENTAL BAKING COMPANY
HOSTESS CAKE DIVISION
Detroit, Michigan

—and—

BAKERY, SALESMEN, DRIVERS,
WAREHOUSEMEN AND HELPERS,
LOCAL UNION NO. 51

I.

The check-in procedure relating to driver salesmen at the two distribution centers (Troy and Livonia, Michigan) shall be modified so as to require that a representative of management be present during times that driver salesmen check in, and be required to count the contents of their envelopes, and compare same with the amounts recorded on the daily settlement sheet;

II.

After such verification, the driver salesman shall be issued a receipt for the contents of the envelope, or, such verification may be noted on the driver's "pink slip" by affixing the date, and initials of the person making the verification;

III.

It shall be the responsibility of each driver to seal the envelopes, and personally deposit it in the safe provided for such purpose;

IV.

The Arbitrator will retain jurisdiction for a period of six (6) months from date of this Award; either party may, prior to

the expiration of said six month period make a written request for reconsideration, review, or modification of the foregoing Award;

V.

In the event such request is filed, the Arbitrator will consider in addition to the evidence heretofore presented such new evidence as relates to the operation of the check-in procedure pursuant to this Award.

AWARD SIGNED, ISSUED AND DATED AT CLEVELAND, CUYAHOGA COUNTY, OHIO, THIS 13TH DAY OF MARCH, 1981.

/s/ HARRY J. DWORAKIN

HARRY J. DWORAKIN,
ARBITRATOR

APPENDIX F

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration
between:

ITT CONTINENTAL BAKING
COMPANY, HOSTESS DETROIT,

and

TEAMSTERS LOCAL 51.

Proceedings had and testimony taken in the above-entitled matter before Arbitrator Harry Dworkin, at 1234 City National Bank Building, Detroit, Michigan, on Thursday, November 20, 1980.

APPEARANCES:

GERRY MILLER, ESQ.
788 North Jefferson Street
Milwaukee, Wisconsin 53202

Appearing on behalf of Union

WILLIAM B. HANLEY AND ASSOCIATES, LTD.
29 South La Salle Street
Chicago, Illinois 60603
(By Gregory J. Schroeder, Esq.).

Appearing on behalf of Company.

**OPENING STATEMENT OF COMPANY COUNSEL,
MR. SCHROEDTER**

1-19 * * *

20 * * * I would like to expand on a position in counsel's opening remarks. And I'd like to begin by giving you a background with respect to the industry, Continental Baking Company is a wholesale business, as you know. It's a wholesale procedure and distributor of bakery products. And it maintains facilities throughout the United States, including a Hostess Cake Plant here in Detroit, Michigan.

Now, the product, the cake product that is produced at the Hostess Plant is taken by transport out to these two what are called branches, or agencies, or depots.

Those terms are used interchangeably.

One located in Troy, Michigan and the other one located in Livonia, Michigan.

And at these branches, or depots, or agencies, the product is taken off the transport, broken down, and ends up on these route trucks.

21-33 * * *

34 * * * The Union has never attempted to bring this matter up in the negotiations. And we believe that this procedure, which has been in effect for an excess of 14 years, is a well-established past practice concerning the Company's control of operations. And that the arbitration form is not the place to change that type of a procedure.

If they have wanted to change it, they could have brought it up during negotiations.

34 * * *

35-39 * * *

40 * * * ARBITRATOR DWOR-KIN: Okay. Before we have a recess, Mr. Miller, could you comment on Mr. Schroedter's inference or statement, that this procedure has been in effect for, according to the Union, 14 years, and the Company claims 18 years, that there have been contract negotiations during this interim, and that the question has never been raised at the bargaining table?

Again, I say this is a representation made by the Company counsel. I do not accept it, as such, as a fact, because these are opening statements. But would you care to comment on that.

MR. MILLER: I believe it to be true, that the matter had not been — has not been raised to negotiation by either side, Mr. Arbitrator.

40 * * *

41-46 * * *

47 ARBITRATOR DWOR-KIN: All right. The Union may proceed.

MR. MILLER: The Union calls Louis Picchi.

LOUIS PICCHI

EXAMINATION BY MR. MILLER:

Q. Would you please state your full name for the record.

A. Louis Picchi, P-i-c-c-h-i.

Q. By whom are you employed?

A. Local 51.

Q. What capacity?

A. President and Business Agent.

Q. How long have you been a President and Business Agent of Local 51?

A. February 5, 1975.

Q. Before that, what did you do?

A. I was Hostess Cake salesman.

Q. For how long?

A. From 1948 to 1975.

Q. Twenty-seven years?

A. Twenty-seven years.

Q. You say Hostess Cake salesman, is that the same as driver-salesman?

48 A. Driver-salesman, yes, sir.

Q. What agency or depot of Hostess Cake did you work at?

A. We started out at the Oakman Boulevard. Then we went to Chicago and Livernois. Then he went to Livonia.

Q. So when you left Hostess Cake in '75, you've been working out of Livonia?

A. Livonia depot.

Q. And for how long did you work out of Livonia?

A. Well, for a time we moved from Chicago and Livernois to Livonia. I don't know what the time span was there.

Q. Did you hold any office or position with the Union when you worked for Hostess Cake?

A. Yes, sir, I was a steward.

Q. For how long?

A. Approximately 20 years.

Q. Did you hold any other office or position with the Union during that period?

A. Well, I was a recording secretary of Local 51. I was also a trustee.

Q. With the Local?

A. With the Local.

Q. Did you have function with respect to negotiating contracts while you were a Hostess Cake driver-salesman?

49 A. I have been on negotiating committees for a number of years.

Q. Just so the Arbitrator understands the nature of negotiations, does Local 51 negotiate its agreements with Hostess Cake individually, or are there other people involved?

A. No, sir. We had multi-employer negotiations in the last — years ago. It took in everybody in the cake and bread business. But in the last six years or so only ITT Continental and Taystee Bread or American Baking Company were involved in the multi-employer negotiations.

Has Local 51 entered into the 1979-1982 salesmen agreement with companies and firms other than Hostess Cake?

A. Yes, sir.

Q. Could you name some of the other companies or firms that have signed this agreement?

A. Hostess, Wonder, Wonder Bread, Taystee, Brown Bunn, Schafer's Koeplinger's.

Q. Are there others you have not named?

A. I think there is. I think there is some that won't come to mind.

49-51 * * *

52 * * * Q. Had the Local, to your knowledge, ever attempted to negotiate a change or changes in the cash and check-in procedure, in your experience, either on the negotiating committee as a rank and filer, or since going with the Union full time?

A. I don't think we've ever tried in formal negotiations. We have in meetings, side meetings, but never as a formal demand.

Q. Why not?

A. Well, actually, I think maybe because we were naive. We always thought, well, the banks, the banks don't make mistakes. And it's all down through the years we have had mistakes ever since we started the bank system.

And when we were at Chicago, we went so far as to short one envelope and give another envelope more money to see if it would come back.

And it invariably, it would come back, right. But we would have lost envelopes. We would have shortages that people swore they put in. And they didn't.

So we would always work on the assumption the bank was right until actually here this Bowker case a couple of years ago when the bank itself admitted that they could lose money in the system, and that the man himself would have to be charged with it.

For instance, I had a case on January — on June 22 where the man called — Bruce Parker lost his envelope.

53-60 * * *

61 * * * Q. Now, later in 1979, following this meeting, did you renegotiate the salesman's agreement with Hostess Cake?

A. Yes, sir.

Q. I take it there was no effort by the Union to negotiate the language that would change the check-in procedure, is that it?

A. No. But we had a couple of side meetings. I had one. And I know the steward from Troy, Ben McKerriher, had one with Fiefer.

Q. In attempt to resolve the basic problem?

A. Right. In an attempt to resolve the check-in system.

61 * * *

62-101 * * *

CROSS-EXAMINATION OF MR. PICCIHI

BY MR. SCHROEDTER

102 * * * Q. So all of the incidents to which you testified that raised the concern in your mind concerning the check-in procedure all occurred prior to October '79, correct?

A. Right.

Q. And it is not true that in October of '79 you negotiated this new current contract with the Company?

A. That is not true.

Q. That is not true.

103 A. No. Because we didn't — we didn't formulate, formally try, but we had a discussion with Fiefer — I had a discussion with Fiefer about this new — because at that sixth meeting on Parker's meeting, we had left it that we were going to try to talk to the Company to make changes.

Q. Let me stop. Let me stop for a minute. Did you make a formal proposal to the Company.

A. No, sir.

Q. In writing that a change in that check-in procedure be made?

A. No.

Q. Did you make a formal proposal to the Company orally, over the bargaining table, that the check-in procedure be changed?

A. No, sir. Just on side meetings.

Q. All you had was a side bar conversation with Jack Fiefer who, at that time, was the labor relations manager for the Detroit area

MR. MILLER: Do you know what a side bar means?

A. Very definitely.

103 * * *

104-112 * * *

113 * * *

**RE-EXAMINATION OF MR. PICCIHI
BY MR. MILLER**

Q. Number two, I am not clear as to the status of your efforts to resolve this problem. During the

course of your negotiations of the contract with spokesmen for the industry last year, first of all, did you ever attempt to negotiate a contract language to put in the agreement, to cover this problem?

A. No, sir.

Q. Why not?

A. I don't know. Because like I said, we were very naive. We always thought the bank was right.

Q. I take it you have been engaging in on-going discussions with the Company of Hostess with this problem?

A. Right.

Q. Before and after your negotiations of your last contract, is that correct?

A. Right, right.

114 Q. Is there a reason why you have not attempted to negotiate contract language as opposed to a new language in your industry contract to cover this situation?

A. *There's no reason that I know of.* (emphasis added).

114 * * *

115-156 * * *

157 * * * ROBERT HEISS, was thereupon called as a witness herein, and after having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION BY MR. SCHROEDTER:

Q. Would you please state your full name for the record?

A. Robert Heiss, H-e-i-s-s.

Q. And where do you live, Mr. Heiss?

A. 17280 Cornell Road, Southfield, Michigan.

Q. By whom are you employed?

A. ITT Continental Baking Company.

Q. And in what capacity are you employed by ITT Continental Baking Company.

A. General manager.

158 Q. Of?

A. Of ITT Continental Baking Company, Detroit, Michigan, Hostess Cake.

Q. Hostess Cake Plant?

A. Hostess Cake.

Q. How long have you been employed as general manager of the Detroit Hostess Cake Plant?

A. Eleven years.

Q. And how long have you been employed with Continental Baking Company?

A. Thirty-four and a half years.

Q. What is the business of Continental Baking Company?

A. We manufacture and distribute cake products in the State of Michigan.

Q. Can you describe your distribution system?

A. At Oakman and Twelve Street we manufacture the cake product and then it is distributed by semis to our branches, Troy and Livonia, which in turn is redistributed onto route trucks. And, in turn, these route trucks make retail outlets, schools,

158 * * *

158-187 * * *

188 Q. That will be Company Exhibit 8. I am showing you what has been marked as Company Exhibit 8. Can you identify that document?

A. Yes.

Q. What is it?

A. Addressed to Mr. Louis Picchi, Teamster Local 51, Trumbull Avenue, Detroit, Michigan. Loss of — turned in envelope March 5, 1976, Tom Patladinas.

Q. Is that your signature which appears on the bottom?

A. Yes, sir, yes, sir.

Q. Did you sign that on or about the date that appears, that is, May 13, 1977?

A. Yes.

Q. On the bottom left-hand corner, do you see two other signatures?

A. Louis Picchi and Tom Patladinas.

Q. Did Louis Picchi sign this in your presence?

A. Yes.

Q. And you recognize the signature, of course?

A. Yes, sir.

Q. You've seen it before?

A. Um-hum.

189 Q. Would you please read the first sentence of the second paragraph?

"It must remain understood, however, that all salesmen representatives must properly turn in daily receipts and the variance granted in this particular case shall in no way alter the established past practice of employees making full restitution upon failure to properly account for their funds."

Q. Would you also turn over to the second page, and you see another three paragraphs, do you not?

A. Yes.

Q. Followed by three signatures?

A. Yes.

Q. Do you recognize those three signatures?

A. Yes, sir.

Q. Whose are they?

A. Patladinas, Ben McKerriher, and Lou Picchi.

Q. And Lou Picchi is the President of the Teamsters Local 51, and McKerriher is the witness who testified here today. Did they sign it in your presence also?

A. Yes.

190 * * * Q. (By Mr. Schroedter, continuing): Would you also read into the record the second paragraph beginning with "And that", along with the third party —

A. "And that this instance does not alter or modify my responsibility of making sure that all my envelopes are properly placed in the Company's safe nightly."

Q. Third paragraph?

A. "The settlement of this one situation is not to be considered as a precedent or of relieving me or any other route sales representative of our responsibility in properly securing our settlement envelopes."

Q. Okay. Thank you. Let me have that back.

ARBITRATOR DWORKIN: What Exhibit is this?

MR. SCHROEDTER: Company Exhibit 8. I have to make a copy of that.

Q. (By Mr. Schroedter, continuing): Now, after this agreement was entered into on May 13, 1977, Company Exhibit A, did you put out a communication to the employees regarding the check-in procedure?

A. Yes.

Q. I'm showing you what's been marked as Company Exhibit 9. Can you identify that document?

A. Yes.

Q. What is it?

- A. It's a recommended settlement sheet acknowledgement.
- Q. It talks about the settlement sheet itself and the checking-in process?
- A. Yes, right.
- Q. Who's it signed by?
- A. Signed by myself, Robert Heiss, General Manager.
- Q. All right. And —
- 192 A. And Thomas Bowker.
- Q. Who acknowledges receipt of an understanding of the policy, is that correct?
- A. Right.
- Q. Now, Bowker's name appears then, and the date 2-15, but there's no year date. When did Bowker begin employment with the Company?
- A. February 13, 1978.
- Q. And was it a policy, at that time, that all new employees be required to fill this out and sign it?
- A. Yes, sir. Yes.
- Q. All right. I'm sorry. Just one last question. Okay. Just one final question, then I'll be through, but I think it's basically out through the testimony of Mr. Picchi that: Did the Union ever attempt to negotiate at the bargaining table a different check-in procedure?
- A. No.

Q. I'm talking about this current contract which begins in '79?

A. No.

Q. Okay. Did you receive any written proposals from the Union to change the procedure over the bargaining table?

A. No.

193 Q. Receive any oral proposals from the Union to change the procedure over the bargaining table?

A. No.

MR. SCHROEDTER: I have no further questions.

A. I was at each one of them.

Mr. SCHROEDTER: You were at all the bargaining sessions?

A. Yes.

193 * * *

1979-1982 SALESMEN'S AGREEMENT

AGREEMENT BY AND BETWEEN

AND

**BAKERY SALESMEN, DRIVERS, WAREHOUSEMEN
AND HELPERS,
LOCAL UNION NO. 51**

OCTOBER 6, 1979 to and including OCTOBER 3, 1982

Joint Exhibit A

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ARTICLE XXIII — ARBITRATION

Section 1. Grievance Procedure

(a) It is agreed that, should any charge of violation of this Agreement, charge of discrimination, grievance or dispute arise between the parties hereto, such matter must be taken up within ten (10) days of the alleged occurrence or it shall be deemed waived. The parties shall make an earnest effort to settle such controversy amicably, but if they fail to do so it shall be submitted to arbitration as provided below.

(b) It is expressly agreed, however, that no employee covered by this Agreement shall have the right to compel the arbitration of his grievance without the written consent of the Union.

Section 2. Selection of an Arbitrator

(a) In the event such controversy has not been settled amicably within ten (10) days after it has been presented, it shall then be submitted to an Arbitration Board, consisting of two (2) representatives of the Employer and two (2) representatives of the Union. Such appointments shall be made within five (5) days. These four (4) representatives, upon failure to settle the controversy shall attempt to select a neutral party or Arbitrator within five (5) days.

(b) Should the representatives of the Union and the representatives of the Employer fail to agree on the neutral party or Arbitrator within five (5) days, they shall jointly request the Federal Mediation and Conciliation Service to submit a list of five (5) suggested Arbitrators from which list one (1) will be chosen by each party, striking two (2) names and the remaining name on said list shall become the neutral party or Arbitrator and arrangements shall be made to hold a hearing before said Arbitrator as quickly as possible.

(c) During such proceedings, there shall be no lockout, strike, or stoppage of work and the decision of said neutral party or Arbitrator shall be final and binding upon both parties hereto.

Section 3. Arbitration Expenses

The expenses of the representatives appointed by the Union shall be paid by the Union and the expenses of the representatives appointed by the Employer shall be paid by the Employer. Any mutual expenses, including fee and expenses of the neutral party or Arbitrator shall be borne equally by the Employer and by the Union.

Section 4. Disputes Over Renewal Agreements

The above mentioned procedure shall not apply to any disputes arising out of negotiations of any subsequent Agreement.

*ITT Continental
Baking Company Inc.*

May 13, 1977

Wonder Bakery

*1100 Oakman Boulevard
Detroit, Mich. 48238
(313) 868-5600*

Mr. Louis Picchi
TEAMSTERS LOCAL #51
2740 Trumbull Ave.
Detroit, Michigan 48201

RE: Loss of Turned-in Envelope, March 5, 1976
T. Pakledinaz

In view of the confusing complex items surrounding the disappearance of Mr. Pakledinaz's cash turn-in of March 5, 1976, the Company is forced to take a position counter to our established past practice. While maintaining that a Sales Representative cannot, under any circumstances, waive his responsibility to properly turn in his/her daily cash receipts (properly recorded and deposited into a safe) careful consideration of the facts in this case appear not to warrant restitution by Mr. Pakledinaz.

It must remain understood, however, that all sales representatives MUST properly turn in daily receipts and the variance granted in this particular case shall, in no way, alter the established past practice of employees' making full restitution upon failure to properly account for their funds. The facts in this particular case are unique and it shall not be considered a precedent in any way, shape, or form.

F-25

Any future instances of failure to properly account for such funds will result in the sales representative's making full restitution.

Very truly yours,

Robert H. Heiss
General Manager
Hostess-Detroit

RHH:crm

Company Exhibit 8

AGREED BY THE UNION:

/s/ LOUIS M. PICCHI

Louis M. Picchi

/s/ T. PAKLEDINAZ

T. Pakledinaz

TO: **Mr. Robert Heiss**
General Manager
Hostess-Detroit

In view of the Company's reversal in not requiring me to pay them the amount of money lost in my cash envelope on or about March 5, 1976, I hereby am waiving and dropping the unfair labor charge that I filed against the Company based on the lost envelope.

I also agree that the circumstances surrounding the loss of the envelope on or about March 5, 1976, were very unique, and that this instance does not alter or modify my responsibility of making sure that all my envelopes are properly placed in the company safe nightly.

The settlement of this one situation is not to be considered as setting a precedent of relieving me, or any other Route Sales Representative, of our responsibility in properly securing our settlement envelopes.

/s/ T. J. PAKLEDINAZ

Employee

/s/ BEN MCKERRIHER

Steward

/s/ LOUIS M. PICCHI

L. Picchi

**RECOMMENDED SETTLEMENT SHEET
ACKNOWLEDGEMENT**

**TO: ALL SALES REPRESENTATIVES,
SUPERVISORS, BRANCH MANAGERS AND
SALES MANAGERS**

FROM: GENERAL MANAGER

Our daily and weekly Settlement Sheets constitute documents whereby each salesperson properly accounts for merchandise delivered to him (her) by the Company. It is the absolute responsibility of such salesperson to *accurately* and *honestly* complete the forms and properly report on all of his (her) sales transactions. When signed by the salesperson, they become representations of the truthfulness of all statements and numbers therein. Any falsification of matters appearing on the Settlement Sheets constitutes a criminal act and could subject the salesperson to legal sanctions.

Should *anyone* suggest or request you to falsify any matter contained in a Settlement Sheet, whether by monetary inducement, coercion or otherwise, you must report the incident immediately to the Bakery General Manager so that corrective action may be taken and you and your job may be properly protected.

Please acknowledge your understanding of the above by signing both copies — one copy is for you — the other will be placed in your personnel file.

Very truly yours,

/s/ ROBERT H. HEISS

General Manager

cc: Personnel Department

I acknowledge receipt and completely understand the above statements of policy.

/s/ THOMAS BOWKER

Signature

2-15

Date

LIVONIA

107

Branch

Route

APPENDIX G

Appendix G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BAKERY SALESMEN, DRIVERS,
WAREHOUSEMEN AND HELPERS
LOCAL UNION NO. 51 A/W THE
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN & HELPERS OF
AMERICA,

Civil No. 81 71232

Plaintiff,

v.

ITT CONTINENTAL BAKING
COMPANY, INC., HOSTESS CAKE
DIVISION,

Defendant.

AFFIDAVIT

JACK PFEIFFER, being first duly sworn, deposes and states as follows:

1. That I am a Vice-President and Director of Labor and Personnel for ITT Continental Baking Company.
2. That during the period 1963-1979, I was a Regional Labor Relations Manager for ITT Continental Baking Company, with responsibilities, *inter alia*, for the negotiation and administration of the successive collective bargaining agreements entered into between the Detroit Hostess Cake Plant of ITT Continental Baking Company and Teamsters Local 51.
3. That during the period 1963-1979, no negotiated changes were made to the grievance-arbitration clause contained in the successive collective bargaining agreements between the Detroit Hostess Cake Plant of ITT Continental Baking Company and Teamsters Local 51.

4. That during the period 1963-1979, all grievances filed by Teamsters Local 51 against the Detroit Hostess Cake Plant of ITT Continental Baking concerned disputes relating to the rights of the parties as they existed under the successive collective bargaining agreements or customary practices.
5. That during the period 1963-1979, no representative of Teamsters Local 51 ever contended, either in negotiations or in grievance meetings, that the grievance-arbitration clause of their successive collective bargaining agreements with the Detroit Hostess Cake Plant of ITT Continental Baking Company provided for interest arbitration; i.e., arbitration wherein the arbitrator is empowered to decide questions of policy relating to what the terms and conditions of employment should be. Questions of policy relating to what the terms and conditions of employment should be were, instead, decided during the negotiations leading to each successive collective bargaining agreement.
6. That during the period 1963-1979, no grievances were filed by Teamsters Local 51 alleging that an Arbitrator had the power, under the grievance-arbitration clause of the successive collective bargaining agreements between Teamsters Local 51 and the Detroit Hostess Cake Plant of ITT Continental Baking, to engage in interest arbitration.

G-3

Further, affiant sayeth not.

/s/ JACK PFEIFFER

JACK PFEIFFER

Subscribed and sworn to
before me this 6th
day of July, 1981

/s/ CARY G. SCHMIEDEL

NOTARY PUBLIC

CARY G. SCHMIEDEL
Notary Public State of New York
No. 4304230

Certified in Westchester County
Commission Expires March 30, 1982